U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAN A. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

Docket No. 00-70; Submitted on the Record;
Issued May 11, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on its merits under 5 U.S.C. § 8128(a) on the grounds that his application was untimely filed and failed to present clear evidence of error.

The only decision before the Board on this appeal is the Office's May 28, 1999 nonmerit decision denying appellant's application for further review on the merits under 5 U.S.C. § 8128(a) of its October 24, 1997 decision. Because more than one year has elapsed between the issuance of the Office's October 24, 1997 merit decision and August 25, 1999, the date appellant filed his appeal, the Board lacks jurisdiction to review the October 24, 1997 merit decision.[1]

The Board finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim on May 28, 1999, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

The Office's regulations pertaining to the requirements for obtaining a review of a case on its merits under 5 U.S.C. § 8128(a), state as follows:

> "(b) The application for reconsideration, including all supporting documents, must: (1) Be submitted in writing; (2) Set forth arguments and contain evidence that either: (i) Shows that OWCP erroneously applied or interpreted a specific point of law; (ii) Advances a relevant legal argument not previously considered by OWCP; or (iii) Constitutes relevant and pertinent new evidence not previously considered by Office."[2]

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[1] *See* 20 C.F.R. § 501.3(d)(2).

[2] 20 C.F.R. § 10.606 (b)(1), (2).

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[3] The Board has found that the imposition of the one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Federal Employees' Compensation Act.[4] When a claimant fails to meet one of the above-mentioned standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act."[5]

In its May 28, 1999 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on October 24, 1997 and appellant's request for reconsideration was dated May 21, 1999 and date stamped as received by the Office on May 25, 1999, which was clearly more than one year after October 24, 1997. Therefore, appellant's request for reconsideration of his case on its merits was untimely filed.

For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office is required to undertake a limited review to determine whether the application demonstrates "clear evidence of error."[6] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[7]

To establish clear evidence of error, a claimant had to submit evidence relevant to the issue which was decided by the Office.[8] The evidence had to be positive, precise and explicit and must be manifest on its face that the Office committed an error.[9] Evidence which did not raise a substantial question concerning the correctness of the Office's decision, was insufficient to establish clear evidence of error.[10] It was not enough merely to show that the evidence could

[3] 20 C.F.R. § 10.607(a).

[4] *Diane Matchem*, 48 ECAB 532 (1997); *Jeanette Butler*, 47 ECAB 128 (1995); *Mohamed Yunis*, 46 ECAB 827 (1995); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] *See Mohamed Yunis, supra* note 4; *Elizabeth Pinero*, 46 ECAB 123 (1994); *Joseph W. Baxter*, 36 ECAB 228 (1984).

[6] *Charles J. Prudencio*, 41 ECAB 499 (1990).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1996). The Office therein states: "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made a mistake (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case on the Director's own motion."

[8] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[9] *See Leona N. Travis*, 43 ECAB 227 (1991).

[10] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

be construed so as to produce a contrary conclusion.[11] This determination of clear error entailed a limited review by the Office of how the evidence submitted with the reconsideration request bore on the evidence previously of record and whether the new evidence demonstrated clear error on the part of the Office.[12] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[13] The Board, on appeal, will make an independent determination as to whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[14]

In the present case, appellant submitted an April 28, 1999 medical report from Dr. Guy W. Fried, a Board-certified physiatrist and appellant's treating physician. Dr. Fried reported appellant's present complaints, noted as history that appellant had "a couple of old injuries from the days [when] he was working at the [employing establishment]," and opined that "these injuries have led to aggressive immobility and pain." Dr. Fried noted that electromyographic testing revealed a right-sided S1 radiculopathy and chronic cervical radiculopathy and he recommended that appellant enroll in a chronic pain program. However, he provided no medical opinion or rationale establishing that appellant's refusal of suitable work on August 4, 1995 was justified, or that the Office erred in terminating appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) on February 9, 1996.[15]

The Office properly performed a limited review of this evidence to ascertain whether it demonstrated clear evidence of error. The Office denied appellant's untimely request for a merit reconsideration on the basis that clear evidence of error was not established. The Board, after performing its own limited review of the evidence submitted, finds that this evidence does not clearly demonstrate that the Office erred in its October 24, 1997 decision denying modification of the termination decision. The evidence from Dr. Fried did not raise a substantial question as to the correctness of the prior Office decision or shift the weight of the evidence in favor of the claimant, it does not, therefore, constitute grounds for reopening appellant's case for a merit review.

The Office did not abuse its discretion in its May 28, 1999 decision, by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

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[11] *See Leona N. Travis*, *supra* note 9.

[12] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[13] *Leon D. Faidley, Jr.*, *supra* note 4.

[14] *Gregory Griffin*, 41 ECAB 186 (1989), *aff'd on recon.*, 41 ECAB 458 (1990).

[15] On April 19, 1999 appellant had previously submitted other reports from Dr. Fried dating back to October 28, 1998, which stated approximately the same thing, noting appellant's symptoms at the time and reporting physical examination results. An April 9, 1999 magnetic resonance imaging report was also submitted which revealed straightening of the cervical spine but no disc herniation or central/lateral stenosis. None of these reports demonstrated clear evidence of error by the Office in its 5 U.S.C. § 8106(c)(2) termination decision.

Accordingly, the May 28, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 11, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member